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NO. 81-2352

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1981

IN THE MATTER OF THE ADOPTION OF:
JEFFREY MYLES JOFFIN
AND
JENNIFER SHANNON JOFFIN

Appeal From the Court of Appeals
For the Eleventh Appellate District
Trumbull County, Ohio

MOTION TO DISMISS

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I

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Now comes the appellee and moves this Honorable Court to dismiss this appeal for the following reasons:

1. This appeal does not present a substantial Federal question worthy of review by this Court.

2. Appellant was in no way prejudiced by the application of Ohio adoption procedure, and substantial justice has been done, since the adoption of the children by Appellee was warranted by the evidence under the test most favorable to Appellant.

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QUESTIONS PRESENTED

1. Does the Ohio procedure for adoption by a step-father of his wife's children, without the natural father's consent, which procedure requires that the Trial Court find (1) that the natural father has failed without justifiable cause to provide for the maintenance and support of the minor children as required by judicial decree for at least one year immediately preceding the filing of the adoption petition and (2) that the adoption is in the best interests of the children, meet minimum requirements for due process of law, even though the adoption procedure does not require an express finding that the natural father is unfit?

2. Does the Ohio adoption procedure, which provides standards for adoption of children of a natural father different from the standards for adoption of the children of a putative father violate equal protection of the laws and if it does, was the Appellant prejudiced by the application of the procedure to him?

TABLE OF AUTHORITIES

CASES

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STATEMENT OF THE CASE

On July 10, 1980, Appellee, John R. Spain, filed petitions in the Probate Court of Trumbull County, Ohio, seeking to adopt his wife's children, Jeffrey and Jennifer Joffin. The matter was set for hearing on January 12, 1981, and a trial lasting several days ensued, during which Appellant was represented by two attorneys and after which the Probate Court found that Appellant had failed to support his children without justifiable cause for the one year period immediately preceding the filing of the petitions for adoption and that as a result, Appellant Joffin's consent to the adoptions was not required. A second evidentiary hearing was held after which the Trial Court also found that the adoptions were in the best interests of the children and ordered the adoptions. On January 30, 1981, certificates of adoption were issued as to each child.

Appellant filed a notice of appeal in the Ohio Eleventh District Court of Appeals on February 3, 1981, appealing the order of adoption as to each child. The Eleventh District Court of Appeals affirmed the judgment of the Trial Court on November 23, 1981. Appellant then appealed to the Supreme Court of Ohio (Case No. 82-38) and on March 17, 1982, the Supreme Court of Ohio refused to accept the case for review.

Appellant Joffin and Susan Spain were married on February 5, 1961, and divorced in Mahoning County, Ohio, on May 14, 1976. Appellee, John R. Spain, married Susan Spain on February 14, 1978, and Jeffrey and Jennifer Joffin, the children who are the subject matter of this litigation, were placed in Mr. Spain's home on that date.

Appellee sought to adopt his two step-children, Jeffrey and Jennifer. Jeffrey consented to the adoption in the Probate Court of Trumbull County, Ohio, being of appropriate age to do so and the children's mother, Susan Spain, also consented to each adoption.

The decree of divorce which terminated the marriage of Appellant and Susan Spain ordered Appellant to pay child support of $200 per month per child, a total support obligation for Jeffrey and Jennifer of $400 per month.

The divorce case between Appellant and his former wife became a battleground over child custody and visitation, a situation which continued to exist after Appellee and Mrs. Spain were married. On February 20, 1979, Appellant filed a motion seeking custody of Jeffrey and Jennifer. As a result of that motion, a Youngstown, Ohio, attorney was appointed guardian ad litem for the children and the Domestic Relations Judge ordered evaluations by a psychiatrist of all parties involved. Both children were to be evaluated as were Dr. Joffin, Attorney and Mrs. Spain and Dr. Joffin's second wife.

Appellant Joffin refused to submit to the psychiatric examinations and accordingly was found in contempt of court by journal entry dated February 22, 1980. On that day, Appellant was also found in contempt of court for failure to pay child support and was sentenced to jail on each separate contempt finding. The sentence was ten days on the failure to pay support and three days for failing to submit to the psychiatric examination.

Appellant was also ordered to pay $3,950 in fees and expenses relative to the psychiatric examinations and his failure to submit to such an examination. By this time, Appellant was at least $3,600 behind in child support.

Appellant was given a chance to purge himself of the contempt citation, but refused to do so. On April 8, 1980, the Domestic Relations Judge ordered Appellant's previous jail sentence of February 22, 1980, into effect and Appellant Joffin was incarcerated in the Mahoning County, Ohio, jail on Tuesday, April 8, 1980. He remained in jail for two days until his release on April 10, 1980.

On April 10, 1980, Dr. Joffin paid $4,000 to gain his release from jail. The money was immediately impounded by the Domestic Relations Judge in a written entry which stated that all allocations of the $4,000 would be made "at a later time".

The order of April 10, 1980, releasing the Appellant from jail made it clear that an arrearage on child support still existed. The judgment entry said,

> "2. Defendant, Bernard Joffin, is hereby ordered to pay the sum of Two Hundred Fifty Dollars ($250) per month on arrearages owed by him per previous orders of this Court, until said arrearages are paid in full..."

Appellant's total monthly obligation therefore became $650 ($400 + $250) until the arrearage was paid. Appellant made one payment of $650 on May 15, 1980, and has made no further child support payments whatsoever since that date.

On June 18, 1980, the bureau of support was ordered by the Domestic Judge to disburse the $4,000 which had been paid by Joffin on April 10, 1980. Disbursements were ordered to Attorney Thomas Infante, the guardian ad litem, and to Dr. Giannini and Attorney Eugene Fox, who received $700 for attorney fees for time spent trying to get Appellant to undergo a psychological examination and then finding him in contempt of court for refusing to do so. There was no evidence in the record of the trial that Appellee Spain or his wife had anything to do with the disbursal of the funds paid into Court on April 10, 1980. Mrs. Spain, the children's mother, got no part of the $4,000.

The relevant period in the adoption proceedings was the period from July 10, 1979, to July 10, 1980. The Appellant's obligation of child support for that twelve month period was $4,800. The total child support paid by Appellant during that period was $650. Appellant argued in the Trial Court that the $4,000 which he paid on April 10, 1980, which was used to satisfy the contempt order and pay the fines and expenses, was really a payment by him against his child support obligation. Dr. Joffin, however, knew of the language in the April 10, 1980, order impounding the funds and finding an arrearage, and had already acknowledged the same by making one increased payment of $650 on May 15, 1980. Also, Joffin received written notice from the bureau of support on June 30, 1980, that he had a child support arrearage of almost $4,600.

The Trial Court found that the payment of $4,000 on April 10, 1980, was not a support payment and that Dr. Joffin had paid only $650 of his $4,800 obligation during the relevant

period; that he did not have justifiable cause for his failure to support and ordered the adoption of each child without his consent.

Appellant Joffin filed a motion for summary judgment in the Trial Court accompanied by his sworn affidavit, Item 12 of which stated:

> "I only stopped making regular monthly support payments in June, 1979, due to the fact that I was unsuccessful in obtaining visitation with my children."

Appellant therefore admitted that his child support payments had stopped 13 months before the petitions for adoption were filed.

ARGUMENT

A state procedure for the adoption of a child by a step-father without the consent of the natural father meets minimal procedural due process of law requirements when it provides or requires:

A. Notice of the proposed adoption to the natural father;

B. Consent to the adoption by the natural mother;

C. A full evidentiary hearing on all issues involved;

D. A finding by the Trial Court that the natural father has failed to support the children without justifiable cause for the one year period immediately preceding the filing of the petition for adoption by the step-father;

E. A finding by the Trial Court that the adoption is in the best interests of the children. Quilloin v. Walcott, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549; Matthews, Secretary of H.E.W. v. Eldridge, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893.

This Court has already decided that the "best interests of the child" test meets minimum requirements for procedural due process of law in an adoption case, Quilloin v. Walcott, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549.

Appellant Dr. Joffin could not, in any way, have been prejudiced by the alleged dual standard contained in the Ohio procedure as set forth in R.C. 3107.07 (A) and R.C. 3107.07 (B). At the outset it should be noted that the Appellant's argument in this connection as to a denial of equal protection of the laws was called "tortured reasoning" by the Ohio Appellate Court and with good reason. Appellant has completely misconstrued O.R.C. 3107.07. Actually, it is more difficult for one to adopt the child of a natural parent than it is the child of a putative parent under the Ohio procedure. It is readily apparent that in each case the standard is the same, that is, failure to support; but that in the case of the putative father, there is no one year requirement as exists in the case of the natural parent. Thus, the child of a putative father could be adopted away from

him on a showing of willful failure to support for a period of time shorter than one year while at least one year is required in the case of a child of a natural parent.

In any event, the Appellant could not have been prejudiced because the evidence supported a finding that Appellant willfully failed to support his children for the relevant period, such that the standard most favorable to Appellant Dr. Joffin and under which it was most difficult for the step-father to adopt Dr. Joffin's children was applied. The affidavit filed in the Trial Court by Dr. Joffin showed that he intentionally stopped paying support for his children. Most important of all is the fact that before the petitions for adoption were filed, Dr. Joffin was given notice that he was over $4,000 in arrears in his child support obligation. Thus, the claim on Page 8 of Appellant's brief that:

> "...he truly believed he had paid his support obligation, a fact undisputed herein,..."

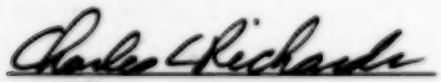
is absolutely false. The failure to pay support in the face of a direct notice from the Bureau of Support could be construed as nothing less than the willful failure to support by the Appellant, thereby allowing the adoptions under the more difficult standard and making any unequal protection argument inapplicable.

The exclusion of the Appellant from the preadoption investigation by the state agency could not in any way have prejudiced Appellant, since a full evidentiary hearing was had at which time Appellant testified at length and all facts which the investigation would have revealed were made known to the Trial Court by Appellant or could have been made known to the Trial Court by him.

CONCLUSION

There are no substantial Federal questions involved in this appeal and the Appellant was in no way prejudiced by the application of the Ohio adoption procedure to him. The appeal should be dismissed.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned, Charles L. Richards, a member of the Bar of the Supreme Court of the United States of America, hereby certifies that on August 9, 1982, a true and exact copy of the motion to dismiss filed on behalf of Appellee was deposited in the United States mail, postage prepaid, and addressed to counsel for Appellant.

Charles L. Richards

CHARLES L. RICHARDS